



Final Report - Ombudsman Investigation
Department of Fish and Game, Board of Fisheries
J2019-0374
August 29, 2019

The Alaska State Ombudsman provides this final public report of the investigation of complaint J2019-0374, pursuant to AS 24.55.200.

Introduction

In May 2019, the Ombudsman received a confidential complaint about the Board of Fisheries (Board). The complaint alleged that the Board violated the Open Meetings Act when it voted to change the location of the 2020 Upper Cook Inlet (UCI) Finfish meeting at its January 2019 meeting.

The Ombudsman notes that the location of the UCI Finfish meeting has been a long-standing source of interest for stakeholders. The Board has held the meeting in Anchorage for at least the past 20 years. The Ombudsman specifically notes that this complaint does not address the substantive issue of where the meeting is held. That decision is properly left to the discretion and authority of the Board. Rather, this report concerns the process used by the Board to reach its decision.

Allegation

The Ombudsman investigated the following allegation

Contrary to law: The Board of Fisheries violated the Open Meetings Act by failing to provide reasonable and consistent notice of its intention to consider the location of the 2020 Upper Cook Inlet Finfish meeting at its January 2019 meeting.

Assistant Ombudsman Kate Higgins investigated this complaint. She provided notice of the complaint to Board of Fisheries Executive Director Glenn Haight on May 23, 2019. The

Ombudsman provided a confidential preliminary report of her findings on July 22, 2019. The Board responded on August 15, 2019.

Based on a preponderance of the evidence,¹ the Ombudsman found the allegation *justified*.²

Statutory Authority

AS 44.62.310 provides in relevant part:

(e) Reasonable public notice shall be given for all meetings required to be open under this section. The notice must include the date, time, and place of the meeting and if, the meeting is by teleconference, the location of any teleconferencing facilities that will be used. Subject to posting notice of a meeting on the Alaska Online Public Notice System as required by AS 44.62.175(a), the notice may be given using print or broadcast media. The notice shall be posted at the principal office of the public entity or, if the public entity has no principal office, at a place designated by the governmental body. The governmental body shall provide notice in a consistent fashion for all its meetings.

(f) Action taken contrary to this section is voidable. A lawsuit to void an action taken in violation of this section must be filed in superior court within 180 days after the date of the action. A member of a governmental body may not be named in an action to enforce this section in the member's personal capacity. A governmental body that violates or is alleged to have violated this section may cure the violation or alleged violation by holding another meeting in compliance with notice and other requirements of this section and conducting a substantial and public reconsideration of the matters considered at the original meeting...

AS 44.62.312 lays out the State of Alaska's policy regarding how government should conduct "the people's business:"

- (a) It is the policy of the state that
 - (1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business;
 - (2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;

¹ The standard of proof used to evaluate all ombudsman complaints is "preponderance of the evidence;" if the evidence indicates that, more likely than not, the administrative act took place and the criticism of it is valid, the allegation should be found justified.

² A complaint is "justified" if the investigation establishes that the administrative action complained of occurred and the Ombudsman determines that criticism of the administrative action is valid. See ALASKA STATE OMBUDSMAN POLICY 4060.03, Findings.

(3) the people of this state do not yield their sovereignty to the agencies that serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created;

(6) the use of teleconferencing under this chapter is for the convenience of the parties, the public, and the governmental units conducting the meetings.

(b) AS 44.62.310(c) and (d) shall be construed narrowly in order to effectuate the policy stated in (a) of this section and to avoid exemptions from open meeting requirements and unnecessary executive sessions.

Background

The Board generally schedules its future meetings on a rolling cycle during its annual October work sessions.³ The notices for these meetings generally indicate that the meetings are non-regulatory in nature and include the following types of items for consideration: election of officers, board committee reports, future board meeting schedules, and administrative issues.⁴ At its October 2017 work session, the Board voted 4-3 to hold the 2020 UCI Finfish meeting in Anchorage.⁵ This meeting was publicly noticed in accordance with the Open Meetings Act.⁶

³ E.g. Alaska Board of Fisheries, Tentative Agenda for October 15-16, 2018 Work Session, (Sept. 28, 2018), <http://www.adfg.alaska.gov/static/regulations/regprocess/fisheriesboard/pdfs/2018-2019/ws/agenda.pdf>; Alaska Board of Fisheries, Tentative Agenda for October 17-19, 2017 Work Session, (Oct. 12, 2017), <http://www.adfg.alaska.gov/static/regulations/regprocess/fisheriesboard/pdfs/2017-2018/ws/agenda.pdf>; Alaska Board of Fisheries, Tentative Agenda for October 18-20, 2016 Work Session, (Oct. 17, 2016), http://www.adfg.alaska.gov/static/regulations/regprocess/fisheriesboard/pdfs/2016-2017/worksession/agenda_worksession_2016.pdf.

⁴ E.g. Alaska Board of Fisheries, Notice of Public Meeting (Sept. 17, 2018), <http://www.adfg.alaska.gov/static/regulations/regprocess/fisheriesboard/pdfs/2018-2019/ws/notice.pdf>; Alaska Board of Fisheries, Notice of Public Meeting (Sept. 7, 2017), <http://www.adfg.alaska.gov/static/regulations/regprocess/fisheriesboard/pdfs/2017-2018/ws/notice.pdf>; Alaska Board of Fisheries, Notice of Public Meeting (Sept. 14, 2016), http://www.adfg.alaska.gov/static/regulations/regprocess/fisheriesboard/pdfs/2016-2017/worksession/worksession_notice.pdf.

⁵ See Alaska Board of Fisheries, Preliminary Summary of Actions October 17-19, 2017 Work Session (Nov. 8, 2017) at 6, www.adfg.alaska.gov/static/regulations/regprocess/fisheriesboard/pdfs/2017-2018/ws/soa.pdf. See also Alaska Board of Fisheries Meeting Audio Recording 10-19-17 at 1:19:16 PM.

⁶ See Alaska Board of Fisheries, Notice of Public Meeting (Sept. 7, 2017), <http://www.adfg.alaska.gov/static/regulations/regprocess/fisheriesboard/pdfs/2017-2018/ws/notice.pdf>.

The issue came up again at the Board's January 2018 Southeast and Yakutat Shellfish and Finfish meeting. At that meeting, then-Board Chairperson John Jensen suggested that the Board table the discussion until its upcoming March meeting to allow for public notice and interested parties to comment.⁷ The Board agreed, and on February 2, 2018, the Board issued a supplemental notice for its March 2018 meeting specifically adding the location of the UCI Finfish meeting to the meeting agenda, along with several other items.⁸

The Board met on March 6-9, 2018 for its Statewide Dungeness Crab, Shrimp, and Miscellaneous Shellfish meeting. On March 9, the Board discussed the location of the 2020 UCI Finfish meeting.⁹ After some discussion, the Board adopted a policy, with a vote of 4-2, to rotate the location of the UCI Finfish meeting between Kenai/Soldotna, Anchorage, and Palmer/Wasilla every meeting cycle, with the 2020 meeting to be held in Kenai/Soldotna:

The board recommends future boards rotate the Upper Cook Inlet Finfish meeting between the three principle communities of Kenai/Soldotna, Palmer/Wasilla, and Anchorage. This policy contemplates the meeting will rotate between these three communities throughout its 3-year meeting cycle. The board recommends holding the 2020 meeting in Kenai/ Soldotna, the 2023 meeting in Wasilla/Palmer, and the 2026 meeting in Anchorage.¹⁰

This decision was not simply a change in location from the previous decision, made at the October 2017 meeting, to hold the meeting in Anchorage. It resulted in the adoption of a formal policy to address stakeholders' interests in having the meeting in communities other than Anchorage.

⁷ See Alaska Board of Fisheries, Preliminary Summary of Actions January 11-23, 2018 Southeast and Yakutat Shellfish and Finfish Meeting at 17,

<http://www.adfg.alaska.gov/index.cfm?adfg=fisheriesboard.meetinginfo&date=01-11-2018&meeting=sitka>.

⁸ The notice was titled "Supplemental Notice of Proposed Changes in the Regulations of the Alaska Board of Fisheries," despite being limited to the addition of ten (10) agenda items to the March 2018 meeting, of which the UCI Finfish Meeting location was one. See Alaska Board of Fisheries, Supplemental Notice of Proposed Changes in the Regulations of the Alaska Board of Fisheries (Feb. 2, 2018),

http://www.adfg.alaska.gov/static/regprocess/fisheriesboard/pdfs/2017-2018/supp_notice_final.pdf.

⁹ See Alaska Board of Fisheries, Preliminary Summary of Actions March 6-9, 2018 Statewide Dungeness Crab, Shrimp, Misc. Shellfish, and Supplemental Issues Meeting at 5,

<http://www.adfg.alaska.gov/static/regprocess/fisheriesboard/pdfs/2017-2018/state/soa.pdf>.

¹⁰ Alaska Board of Fisheries, Policy Regarding the Location of the Upper Cook Inlet Finfish Meeting, 2018-289-FB (*adopted Mar. 9, 2018*), <http://www.adfg.alaska.gov/static/regprocess/fisheriesboard/pdfs/findings/2018-289-FB.pdf>.

At the January 15-19, 2019 Arctic/Yukon/Kuskokwim Finfish meeting, the subject of the 2020 UCI Finfish meeting location was raised again. On the first day of the meeting, Chairperson Reed Morisky announced that the Board would likely be considering the meeting location near the end of the meeting.¹¹ On January 18, Chairperson Morisky brought up the issue and asked for a motion.¹² Board member Jensen moved to relocate the 2020 UCI Finfish meeting back to Anchorage.¹³

The Board discussed the issue at length and received advice from Assistant Attorney General Seth Beausang. Mr. Beausang advised the Board that, because this was not a regulatory matter, the Board simply needed to consider whether it had provided reasonable notice, consistent with the Board's past practice as required by the Open Meetings Act.¹⁴ Board member Robert Ruffner voiced his opinion that the Board's consideration of the UCI Finfish Meeting location did not comply with the Open Meetings Act.¹⁵ He noted that the matter was outside the usual scope of issues addressed at Arctic/Yukon/Kuskokwim regional meeting.¹⁶ He also noted that Chairperson Morisky announced the addition of the UCI Finfish Meeting location to the agenda after the opportunity to sign up for public comment at the January 2019 meeting had passed.¹⁷

Mr. Ruffner additionally voiced concerns that the Board Chairperson had, during a break, advised several interested parties, including the mayor of the City of Kenai, that the Board would not be taking up the meeting location.¹⁸ Based on that assurance, the stakeholders left the meeting.¹⁹ Mr.

¹¹ See Alaska Board of Fisheries Meeting Audio Recording, Jan. 15, 2019, at 2:26:50 PM, http://www.adfg.alaska.gov/static/regprocess/fisheriesboard/swf/2018-2019/ayk_audio/index.html?mediaBasePath=/Meeting%2001-15-19%20BOF%20%28Jan-15-19%205-15-49%20PM%29&title=Meeting%2001-15-19%20BOF#.

¹² See Alaska Board of Fisheries Meeting Audio Recording, Jan. 18, 2019, at 1:46:37 PM, http://www.adfg.alaska.gov/static/regprocess/fisheriesboard/swf/2018-2019/ayk_audio/index.html?mediaBasePath=/Meeting%2001-18-19%20%28Jan-18-19%205-00-15%20PM%29&title=Meeting%2001-18-19%20BOF#.

¹³ *Id.* at 1:47:27 PM.

¹⁴ *Id.* at 1:49:17 PM.

¹⁵ *Id.* at 1:59:22 PM.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

Ruffner described this as “patently unfair” to Kenai/Soldotna stakeholders who had made the effort to attend this meeting.²⁰

Chairperson Morisky admitted on the record that he had done this, stating:

Yes, I did speak with the Kenai official and he expressed that if it looked like we weren’t going to take this up, he wanted to leave. And the conversation we had at the time was that it looked like weren’t going to take this up at the meeting. So, I take full responsibility for that, there was no intent to mislead. He left and circumstances changed, and I apologize for that but we’re here now and we’re going to vote on this.²¹

The Board then voted 4-3 to move the 2020 UCI Finfish meeting back to Anchorage, contradicting the policy it had adopted in March 2018.

During a June 13, 2019 telephonic interview with Assistant Ombudsman Higgins, Chairperson Morisky was unable to describe what or how “circumstances changed” between the time that he advised the Kenai mayor that the Board would not be considering the meeting location and that afternoon when he raised the issue for consideration.²²

Analysis

The Ombudsman evaluates complaints objectively and bases her findings upon the preponderance of the evidence. This means the evidence must show that it is more likely than not the agency made a mistake before we can make a critical finding or recommendation to the agency.

Allegation: The Board of Fisheries violated the Open Meetings Act by failing to provide reasonable and consistent notice of its intention to consider the location of the 2020 Upper Cook Inlet Finfish meeting at its January 2019 meeting.

²⁰ *Id.*

²¹ *Id.* at 2:06:57 PM.

²² Telephone Interview by Assistant Ombudsman Kate Higgins with Reed Morisky, Chairperson, Alaska Board of Fisheries,(June 13, 2019)..

AS 44.62.310(e) requires that state agencies provide “reasonable” and “consistent” public notice of its meetings. In this case, it is undisputed that the Board provided notice of its January 2019 meeting. The notice, however, did not include the 2020 UCI Finfish meeting location on the agenda. The question is whether the notice was sufficient to alert the public that the Board would be considering the UCI Finfish location at that meeting, and whether the notice provided was consistent with the Board’s past practices.

The evidence showed that the Board usually discusses and decides on future meeting dates and locations during October work session meetings that are publicly noticed. In this case, the 2020 UCI Finfish location was reconsidered several times after it was originally set for Anchorage at the October 2017 work session. It first came up at the January 2018 Southeast Shellfish and Finfish meeting, but then-Board Chairperson Jensen tabled discussion for lack of notice satisfying the requirements of the Open Meetings Act. The matter was publicly noticed for the March 2018 meeting, at which the Board considered and voted to move the meeting to Kenai/Soldotna.

Board Chairperson Morisky raised the issue at the January 2019 meeting, apparently *sua sponte*. No prior notice was given to the public that the issue would be on the agenda. Mr. Morisky simply announced on the first day of the meeting that the Board would take it up “near the end” of the meeting. Chairperson Morisky relied on the “subject to change” language in the agenda as reasonable notice for the addition of the UCI Finfish Meeting location to the meeting agenda.²³

This sort of notice is insufficient to meet the “reasonable notice” standard set in the Open Meetings Act. It only served to alert those individuals already at the meeting of the reconsideration of the UCI Finfish meeting location. Considering that the January 2019 meeting was for Arctic/Yukon/Kuskokwim Finfish issues, it is unlikely that many individuals interested in the UCI Finfish location would have been present to hear the Chairperson’s statement.

Despite the paucity of the notice given of the addition of the UCI Finfish meeting location to the January 2019 meeting, interested members of the public managed to learn of the change and travel more than 100 miles to attend. Then, the Board Chairperson by his own admission told representatives from the Kenai/Soldotna area that the matter wouldn’t be taken up – only to

²³ *Supra* n. 12 at 2:01:32 PM.

introduce the matter for a vote later the same day, after they had gone. This not only violates the spirit and the letter of the Open Meetings Act, it brings into question whether the Board Chairperson and members acted in good faith.

The Board's decision to take up the issue of the 2020 UCI Finfish meeting location at the January 2019 meeting was inconsistent with its past practice. When the Board decided to take up this exact same issue, just a year earlier, it tabled discussion when it became apparent that the Board had not met the public notice requirements of the Open Meetings Act. The Board properly decided to wait until the next scheduled meeting to take up the issue, specifically to allow for public notice.

The Ombudsman also points out that the decision made at the January 2019 meeting was not simply a scheduling decision. The Board revisited a matter that had been discussed, voted upon, and reduced to a formal policy not even a year prior: to rotate the UCI Finfish meeting among the three major Cook Inlet communities. The Board did this without any meaningful notice that the Board was intending to take action contrary to board policy.

Therefore, based on the preponderance of the evidence, the Ombudsman finds that the Board violated the Open Meetings Act when it raised and voted to change the location of the 2020 UCI Finfish meeting on January 18, 2019 because it did not provide reasonable notice, consistent with its past practices.

Proposed Recommendation

Recommendation 1: The Board should cure the violation in accordance with AS 44.62.310(f) by reconsidering its decision at a publicly noticed meeting.

AS 44.62.310(f) provides that an agency can cure a violation "by holding another meeting in compliance with notice and other requirements of this section and conducting a substantial and public reconsideration of the matters considered at the original meeting." The Board can cure the violation in one of two ways. The Board can hold a stand-alone meeting to reconsider the 2020 UCI Finish meeting location, with reasonable and proper advance public notice. Alternatively, the

Board can issue a supplemental notice, as it did for its March 2018 meeting, adding the 2020 UCI Finfish location to its already-scheduled October 23-24, 2019 work session meeting.

Board's Response

In his August 15, 2019 response to the Ombudsman's preliminary report, Chairperson Morisky agreed to implement the recommendation by holding another vote at its October 23-24, 2019 work session meeting. He also committed to reviewing the policy, adopted in March 2018, of rotating the UCI Finfish meeting between the Anchorage – Kenai/Soldotna – Palmer/Wasilla areas to “determine if it holds any future viability.”²⁴

Conclusion

The Ombudsman appreciates that the Board intends to implement her recommendation at its upcoming October meeting and to review its policy regarding the UCI Finfish meeting location to determine if it wishes to retain or revoke it. The Ombudsman recognizes that the decision to set a meeting location may be, in some circumstances, a purely ministerial action. However, in this instance, the Board itself has noted that “one of the most divisive issues it faces almost every year is not a regulatory subject, but rather where to hold the Upper Cook Inlet Finfish meeting.”²⁵ As such, the Board should exercise increased diligence to ensure that its decisions on this issue are beyond reproach, to include strict adherence to the Open Meetings Act.

²⁴ See Appendix A, Board's Response, August 15, 2019.

²⁵ Supra n.10.



Appendix A

Board of Fisheries Response to Ombudsman's Preliminary Report, August 15, 2019



THE STATE
of **ALASKA**
GOVERNOR MICHAEL J. DUNLEAVY

Department of Fish and Game

BOARD OF FISHERIES

1255 West 8th Street
P.O. Box 115526
Juneau, Alaska 99811-5526
Main: 907.465.4110
Fax: 907.465.6094

August 15, 2019

J. Kate Burkhart
Alaska State Ombudsman
130 Seward Street, Suite 501
Juneau, Alaska 99801

Subject: Response to Ombudsman Preliminary Report J2019-0374

Dear Ms. Burkhart:

Thank you for the opportunity to provide a response to the Ombudsman's Preliminary Report (report) on its case J2019-0374. After reviewing the report and discussing it with legal counsel, please note the following remarks.

To the main finding of the report, the Board of Fisheries (board) will hold another vote on where to have the 2020 Upper Cook Inlet (UCI) Finfish meeting in accordance with the Open Meetings Act (OMA) in AS 44.62.310. The board will conduct the vote at its October 23-24 Work Session in Anchorage. As noted in the report, the work session is customary for determining future meeting dates and locations, as well as a host of other administrative matters. As the report indicates in footnote 3, non-regulatory meeting notices are not bound by a 30-day in advance notice as is the standard for proposed regulatory action (AS 44.62.190). The work session notices are also not "supplemental notices" as provided in Recommendation 1 on Page 9 of the preliminary report. We will issue the work session meeting notice in a reasonable and customary manner, and specifically identify a vote will occur again on the UCI meeting location.

At the same time the board will review its *Policy Regarding the Location of the Upper Cook Inlet Finfish Meeting* (2018-289-FB) to determine if it holds any future viability. It is within the board's purview to revoke a policy.

To allay potential concern or confusion over the process described above, it appears helpful to clarify how the board approaches meeting notices for legal (regulatory) versus non-regulatory subjects. In the normal course of the board's meeting cycle, the board will issue its first legal notice (as required under AS 44.62.190(a)) immediately following its work session. That legal notice addresses all regulatory proposals received previously in April for the board's "call for proposals", and other regulatory proposals accepted since that time. Other regulatory proposals typically include accepted agenda change requests and board generated proposals determined at the work session. After this initial legal notice goes out, if other regulatory proposals are developed at subsequent meetings the board will issue a supplemental legal notice. This does not always occur if there are no new regulatory proposals. Non-

regulatory notices, or meeting notices, are typically done for board work sessions and committee meetings. They follow less stringent and costly requirements than full legal notices. However, if a legal notice is set for release and non-regulatory subjects need noticed as well, those non-regulatory subjects are added to the legal notice to reduce the volume of notices going to stakeholders.

Footnote 8 on Page 4 discusses the contents of the “Supplemental Notice of Proposed Changes in the Regulations of the Alaska Board of Fisheries”. This was a legal notice. When the board determined at the January 2018 Southeast meeting that it would hold a renewed vote on the UCI meeting in March, it had two new regulatory proposals that needed to be legally noticed in accordance with AS 44.62.190(a). Rather than issue multiple notices in different manners, the supplemental legal notice was used as the vehicle to notice the UCI meeting location vote and the other non-regulatory issues. Had there not been any new regulatory proposals before the board, a simple meeting notice would have been issued.

On another matter, Page 1 suggests having Anchorage serve as the location for the UCI Finfish meeting is a source of “dismay” to stakeholders from both the Kenai/Soldotna and Palmer/Wasilla regions. While it is clear most (although not all) of the interest we receive from the Kenai/Soldotna region is to have the meeting on the Kenai Peninsula, it is also clear the preponderance of comments from stakeholders from the Palmer/Wasilla region indicates Anchorage is the preferred location.

Thank you for your consideration in this matter.

Sincerely,



Board of Fisheries

cc: Board of Fisheries Members
 Doug Vincent-Lang, Commissioner, Alaska Department of Fish & Game
 Aaron Peterson, Assistant Attorney General, Department of Law